



AMERICAN BENEFITS

COUNCIL

October 6, 2008

Filed Electronically

Office of Regulations and Interpretations
Employee Benefits Security Administration
Attn: Investment Advice Regulations and Class Exemption
Room N-5655
U.S. Department of Labor
200 Constitution Avenue NW
Washington, DC 20210

Re: Comment on Proposed Regulations and Class Exemption for Investment Advice Provided to Participants and Self-Directed Individual Account Plans and IRAs

Dear Sir or Madam,

The American Benefits Council (Council) appreciates the opportunity to comment on proposed regulations and a proposed class exemption that the Employee Benefits Security Administration published on August 22, 2008, which would cover the provision of investment advice to participants in individual account plans and IRA owners. The Council is a public policy organization principally representing Fortune 500 companies and other organizations that assist employers of all sizes in providing benefits to employees. Collectively, the Council's members either sponsor directly or provide services to retirement and health plans that cover more than 100 million Americans.

We would like to start by recognizing and commending EBSA. The proposed regulations and their companion proposed class exemption represent very significant steps towards enhancing and expanding access to professional, high-quality investment

advice for IRA owners and participants in individual account plans that permit participant investment direction (collectively “participants”). The Council believes that, if finalized, these proposals have the potential to greatly improve retirement savings for millions of working Americans, and we urge EBSA to move expeditiously in finalizing the proposed rules.

We provide below a number of suggestions for improving and clarifying the proposals.

Effective Date

As mentioned above, we recommend that the EBSA move quickly to finalize the proposed rules. There is significant demand for individualized investment advice and the pending rules have significant promise. We also suggest that the final rules permit reliance upon publication. As proposed, the class exemption would be effective 90 days after the publication of the final exemption and the new regulations would be effective 60 days after publication of the final regulations. We see little reason to delay reliance for a stated number of days following publication and believe that plan fiduciaries should be able to rely on the regulations and the class exemption as soon as the new rules are published.

Safe Harbor for Plan Sponsors

The proposed regulations and class exemption stipulate that relief from the prohibited transaction rules is conditioned upon the plan fiduciary expressly authorizing the investment advice arrangement. Field Assistance Bulletin 2007-1 provides that a plan sponsor or other fiduciary will not be liable for the advice furnished by an authorized investment advice provider if the fiduciary prudently selects and monitors the advice provider, even if such advice is provided pursuant to a statutory exemption from the prohibited transaction rules. The Field Assistance Bulletin goes on to confirm that monitoring does not involve specific investment advice given but rather involves a variety of relevant facts and circumstances. The Council strongly supports the analysis reflected in the Field Assistance Bulletin.

The Council, however, is concerned that the new rules do not provide relief from the fiduciary and prohibited transaction consequences if a fiduciary adviser fails to satisfy the many detailed requirements of the proposed regulations or class exemption. The two pieces of guidance both place the applicable disclosure and compliance requirements largely on the fiduciary adviser. Notwithstanding a plan sponsor’s diligent fiduciary monitoring and selection, there will inevitably be minor failures with respect to the new rules’ numerous disclosure and other compliance requirements. For example, a fiduciary adviser may fail to provide the requisite annual notice on a timely basis. Clearly, such a failure should not adversely affect the plan sponsor and we are concerned that employers will be reluctant to offer investment advice arrangements unless this point is clarified. Accordingly, we urge EBSA to confirm that a plan sponsor

or other plan fiduciary will not be adversely affected if, notwithstanding prudent selection and monitoring, a fiduciary adviser fails to satisfy the requirements of the regulations or class exemption.

Managed Accounts

The class exemption provides relief only if the “sale, acquisition or holding of a security or other property on behalf of a plan or IRA occurs solely at the direction of the recipient of the investment advice.” The outer bounds of the “solely at the direction of the recipient” requirement are not entirely clear and the Council strongly recommends that EBSA clarify this requirement.

Consider, for example, a common managed account program where a participant is provided investment advice based on a computer model that relies on Advisory Opinion 2001-09A (the “SunAmerica Opinion”). The computer model is updated periodically to reflect changes in capital markets assumptions and the model automatically adjusts its advice as a participant ages. Under such a program, a participant may affirmatively elect to have his or her account invested in accordance with the computer-based advice and then may also affirmatively direct that his or her account be rebalanced on a periodic basis in accordance with the outputs of the computer model.

The Council strongly believes that this approach should also be available for computer-based advice programs that rely on the proposed regulations or proposed class exemption. Put differently, the final rules should clarify that such an evergreen election to rebalance is an investment that is made solely at the direction of the recipient of the advice. We appreciate that there are limits to this principle. At a certain point, a participant’s direction to invest in accordance with instructions provided by a fiduciary adviser will constitute discretionary asset management. However, this is obviously distinguishable from rebalancing.

Information about Participant

Both the proposed regulation and proposed class exemption provide that the investment advice take into account a laundry list of factors essentially taken from ERISA Section 408(b)(3)(b)(ii) (as added in the Pension Protection Act for investment advice using computer models) which includes “age, life expectancy, retirement age, risk tolerance, or other assets or sources of income and preferences as to certain types of investments.” However, the statutory reference indicates the information about the participant taken into account “may” include the factors listed above while the proposed guidance appears to require that these factors be taken into account.

Some of the factors may be difficult to obtain (for example, some participants may not want to share information about other assets or sources of income) and others may be redundant (for example, age versus life expectancy).

The Council recommends that the Department take the statutory approach, clarifying that advisors have some flexibility on which participant factors are taken into account for the investment advice, so long as the investment advisor discloses to plan fiduciaries which types of information are used in formulating the advice.

Impact on Existing Computer Model Programs

The proposed regulations, the proposed class exemption and Field Assistance Bulletin 2007-1 collectively make clear that existing investment advice programs are not adversely affected by the new guidance. The Council applauds EBSA for making this point clear. However, the new class exemption would authorize individualized investment advice in certain circumstances in which a participant has been provided computer-based investment advice. The concept is one that the Council supports. Namely, that computer-based investment advice can provide a much-needed context for more individualized off-model advice.

The class exemption, however, provides that a computer model must satisfy all of the bells and whistles that apply to a computer model under the exemption in order to be the basis for off-model advice. Put differently, even if advice under a computer model, such as a model based on the SunAmerica Opinion, does not raise prohibited transaction concerns, it nevertheless must meet all of the requirements as if it raised such concerns in order to be the predicate for off-model advice. The Council does not believe that this approach makes sense and we recommend that EBSA reconsider this requirement. Computer models that are created by independent third-party financial experts should be a permitted basis for off-model advice without regard to the numerous bells and whistles imposed for computer models that are created by the fiduciary adviser. Any other answer will unnecessarily limit the utility of existing investment advice programs.

Coordination with Securities Laws

EBSA has in recent months taken great strides in coordinating with the SEC on a variety of projects, most notably its participant-level fee disclosure regulations and a recently announced Memorandum of Understanding on enforcement matters. We recommend that EBSA consider expanding such coordination to include the proposed regulations and class exemption. There are a number of instances in which the proposed new rules depart from existing securities law disclosure requirements. These are often minor differences, but ones that can increase the cost of these programs and create traps for the unwary. For example, the proposed regulations says that advice must take into account "life expectancy" while the securities laws generally require taking into account

a participant's "time horizon." It is important that the ERISA rules be coordinated with the securities laws rules to the maximum extent possible and appropriate.

Annuity Investment Options

The proposed regulations and class exemption generally require that any computer-based investment advice program must take into account all of the designated investment alternatives available under a plan. EBSA has, however, very wisely created exceptions for company stock funds and self-directed brokerage windows. The exception for company stock funds provides that an eligible investment advice arrangement may, but does not have to, take company stock funds into account. We recommend a similar exception for in-plan annuity investment options. As EBSA is aware, in recent years, a number of individual account plans have introduced annuity purchase programs that serve as both accumulation and distribution options. A few investment advice programs are able to take some less complex annuity investment options into account while others are not. The Council believes that plans with these investment options should not be barred from reliance on the new rules and we recommend a parallel exemption allowing the program to either take into account or disregard an annuity investment option under a plan.

Self-Directed Brokerage Windows

As mentioned above, the proposed rules appropriately create an exception for self-directed brokerage windows that allows the window to be disregarded in applying the computer model. The proposed rules do not, however, address the provision of investment advice in connection with a participant's decision to invest in an open brokerage window. Self-directed brokerage windows are strongly analogous to IRAs and the Council recommends that the investment advice options that are available to IRA owners, including off-model advice based on substantial investment education materials, be permissible with respect to self-directed brokerage windows.

Audits

The proposed regulation and proposed class exemption both require fiduciary advisers to engage, at least annually, an independent auditor to conduct an audit of the arrangement. The proposals include only very general guidance regarding the audit. We understand that the intent of the proposals is to leave to the fiduciary adviser the decision as to whether the auditor is qualified and the necessary scope of the audit within broad guidelines. We generally agree with this approach, but would like to raise certain issues for clarification.

One issue that needs clarification is that the audit is not required to be done by a lawyer. The Paperwork Reduction Act analysis in the preamble to the regulations assumes that the audit will be "outsourced to an independent legal professional."

Because this is not in the substance of the preamble or the regulation, we assume that the reference to a legal audit was inadvertent, but it has created unnecessary confusion.

We would also appreciate further guidance regarding the standards for auditing compliance with the requirements of the exemptions. Specifically, we would like confirmation of two points. First, with respect to off-model advice, it is our understanding that the audit would review whether the fiduciary adviser (1) has adopted written policies and procedures designated to ensure compliance, (2) and has complied with such policies and procedures and with the requirements of the exemption. However, the audit would not be intended to “second guess” the investment advice provided to the participants. In other words, if, for example, the fiduciary adviser has documented his or her advice in compliance with the class exemption, the auditor is not required to effectively become an investment adviser and evaluate the advice given.

Second, we ask for confirmation that, for purposes of any audit, “sampling” can occur at the financial institution level, not at the plan level or the individual adviser level. For example, the audit requirement would be unworkable if a sampling of every individual adviser’s customers were required. It would also be unworkable if a representative sampling were required with respect to every plan participating in an advice program. If, for example, hundreds or thousands of plans are participating in an advice program maintained by a financial institution, it should be sufficient to audit such program through a sample of such plans.

Consequences of Noncompliance

The proposed class exemption provides that the exemption does not apply to any advice to an individual if the conditions of the exemption are not satisfied with respect to the advice. Further, if there is a pattern or practice of noncompliance, the exemption is not available for all advice under the arrangement.

As noted above, the Council foresees numerous instances in which minor, innocuous operational errors arise in administering an eligible investment advice arrangement. The proposed rules appropriately include a wide range of protections intended to protect participants and IRA owners. However, an inevitable consequence of such detailed compliance responsibilities is the prospect of operational failures. Given the draconian consequences associated with a prohibited transaction, we believe that it is appropriate for the EBSA to create either a de minimis rule for minor errors or a program that allows for self-correction. Innocent operational failures should not taint the advice given if reasonable corrective steps are taken. Accordingly, the Council urges EBSA to consider some relief for minor and inadvertent errors.

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Again, we appreciate the opportunity to comment on the proposed investment advice guidance. We believe that the American Benefits Council offers an important and unique perspective of both the employer sponsors of retirement plans and the service providers that assist them, and we look forward to working with you on these important changes.

Sincerely,

A handwritten signature in black ink, appearing to read "Jan Jacobson". The signature is fluid and cursive, with a long horizontal stroke extending to the right.

Jan M. Jacobson
Senior Counsel, Retirement Policy
American Benefits Council